IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-1711

* * *

JEFFREY ROBERT MALLEK,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For A Writ Of Certiorari To The Criminal District Court Number Two Of Dallas County, Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

RENEA HICKS
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	4
I. There being no final judgment or decree, this Court does not have jurisdiction under 28 U.S.C. §1257 to exercise its powers of review	4
II. The hashish discovered by the police officers during the inventory search of Petitioner's automobile was not seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution	7
III. Since the petition was not filed within the time limits established by Rule 22(1), Rules of the United States Supreme Court, this Court should refuse to exercise its discretionary powers of review	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
Berman v. United States, 302 U.S. 211	6
Cady v. Dombrowski, 413 U.S. 433	9
Chapman v. California, 405 U.S. 1020	7
Cooper v. California, 386 U.S. 58	9
Parr v. United States, 351 U.S. 513	6
Savant v. State, 535 S.W.2d 190	6

TABLE OF AUTHORITIES (continued)

South Dakota v. Opperman, 428 U.S. 364 ..... 7, 8, 9, 10

Tyra v. State, 548 S.W.2d 912 6

United States v. Hellman, 556 F.2d 442 8

Constitution, statutes, rules, and ordinances:

United States Constitution:

Fourth Amendment 2, 7, 8
Fourteenth Amendment 2, 7

28 U.S.C. §1257 ..... 2, 4, 6, 11

Rules of the United States Supreme Court:

Rule 22(1) 10, 11

Texas Code of Criminal Procedure:

Article 42.01 6
Article 42.12, §3d 2, 5, 6

Vernon's Texas Civil Statutes Annotated:

Article 6701d, §27(a)(10) 3
Article 6701d, §94(c)(5) 3

Dallas City Ordinance, §28-4(a)(5) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-1711

* * *

JEFFREY ROBERT MALLEK,
Petitioner

V.

STATE OF TEXAS
Respondent

* * *

On Petition For A Writ Of Certiorari
To The Criminal District Court Number Two
Of Dallas County, Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

The State of Texas, Respondent herein, by and through the Attorney General of Texas, respectfully requests that the Court deny the Petition for a Writ of Certiorari, seeking review of an order of Criminal District Court Number Two of Dallas County, Texas, entered on October 13, 1978, which placed Petitioner on probation following his plea of not guilty to the felony offense of unlawful possession of a controlled substance and which deferred a final adjudication of Petitioner's guilt.

OPINION BELOW

There is no opinion by the court below, other than the

October 13th order, a copy of which may be found in Appendix A of the Petition for a Writ of Certiorari.

JURISDICTION

This Court does not have jurisdiction to review this case under 28 U.S.C. §1257 because the petition does not seek review of a final judgment or decree. *See* Part I, *infra*.

QUESTION PRESENTED

WHETHER THE HASHISH DISCOVERED BY THE POLICE OFFICERS WAS SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner asserts that the Fourth and Fourteenth Amendments to the United States Constitution are involved.

The jurisdictional issue raised by Respondent involves 28 U.S.C. §1257 and art. 42.12, §3d, Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

Following his indictment for the unlawful possession of hashish, Petitioner filed a motion to suppress evidence, arguing that the search of his automobile which yielded the hashish was in violation of the Fourth Amendment.

The only witness at the suppression hearing was one of the arresting officers who, along with his partner, was dispatched to the scene of a one-car accident in the early morning hours of January 5, 1978. Upon arriving at the scene of the accident, the officers encountered Petitioner, who was loudly protesting that he did not

want to be placed in an ambulance that already was at the scene. The officers, observing that Petitioner was drunk, arrested him for public intoxication and placed him in the back seat of the patrol car. Answering the officers' inquiry, Petitioner indicated that the disabled car involved in the accident was his.

Since the car was disabled and there was no one present to whom the officers could release it, a city wrecker was called in to impound the car, so that the officers could fulfill their statutory duty to keep the public streets clear. Art. 6701d, §§27(a)(10) and 94(c)(5), Vernon's Tex.Civ.Stat.Ann.; §28-4(a)(5), Dallas City Ordinance (1978). Before the car was hauled away, however, the officers performed an inventory search of the automobile.

Pursuant to a city policy of Dallas, embodied in general orders issued by the city's chief of police, such an inventory search is performed every time a wrecker is brought in to impound an automobile. The contents of the automobile are noted on the accident report form prepared by the officer, and later this information is transferred to a "pound" book which indicates the contents of and extent of any damage to automobiles brought into the city impoundment yard. Although the city's policy leaves the officers in the field with some limited discretion about the extent of inventory searches, the police officer in the instant case testified that he generally conducted a very thorough search, primarily to protect himself and the wrecker driver from any later charges of theft should items be missing from the car.

The inventory search initially revealed phonograph albums scattered in the back seat of Petitioner's car. Then, between the two front seats but close to the driver's side, the officers saw in plain view a medium-sized brown paper bag and, through a rip in the bag, a

plastic bag inside. Inside the plastic bag, the officers noted a hand-rolled marijuana cigarette and a package of aluminum foil, folded into an inch square. Opening the tinfoil to note its contents, the officers found the hashish. Subsequently, Petitioner was charged with its unlawful possession.

Following the trial court's denial of the motion to suppress, Petitioner waived his right to jury trial and pleaded not guilty. The judge then entered an order indicating that the evidence substantiated Petitioner's guilt and placing Petitioner on probation for two years. Significantly, the court did not enter a final adjudication of guilt. Petitioner did not appeal to the Texas Court of Criminal Appeals. Furthermore, since the deferred adjudication order, Petitioner has not gone before the trial court to seek a final adjudication of his criminal proceeding and, in fact, no final adjudication has been made.

The deferred adjudication order was entered on October 13, 1978. On January 15, 1979, Petitioner submitted an as yet unruled upon motion for extension of time in which to file his petition with this Court, seeking an extension until March 8, 1979. On April 27, 1979, the petition was filed.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

There Being No Final Judgment Or Decree, This Court Does Not Have Jurisdiction Under 28 U.S.C. §1257 To Exercise Its Power Of Review

Under 28 U.S.C. §1257, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

Court...." No final judgment or decree has been rendered by a Texas court against Petitioner and, therefore, this Court lacks jurisdiction to address the issue raised by him.

As Petitioner concedes, *see* Petition for Writ of Certiorari at 4, and as the October 13th order which Petitioner seeks to have reviewed makes clear, Petitioner has never been adjudged guilty of the offense of unlawful possession of the hashish seized during the inventory search of his car. Instead, a final adjudication of Petitioner's guilt has been deferred under the provisions of art. 42.12, §3d(a), Texas Code of Criminal Procedure, and he has been placed on two years probation.

When the probationary period has expired, if the Court has not in the meantime adjudged Petitioner guilty, "the court shall dismiss the proceedings against the defendant and discharge him." Art 42.12, §3d(c), Tex.C.Crim.Proc. That same section also permits a judge to dismiss proceedings and discharge a defendant such as Petitioner earlier if it would be in best interests of both society and the defendant. "A dismissal or discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense...," with one exception not relevant here. *Id.* In short, at this time Petitioner does not stand convicted of the offense with which he was charged, and, unless he violates a condition of probation, he will never stand convicted of it.[1]

---

[1]The state trial court's deferred adjudication proceeding does not appear to have fully complied with state law. The October 13th order recites that Petitioner pleaded not guilty, yet the deferred adjudication method of avoiding entry of a conviction, by the terms of §3d(a) of the statute, is not supposed to be available to a criminal defendant unless he pleads guilty. This problem, however, has no effect on the finality issue.

Although Petitioner under §3d(a), Tex.C.Crim.Proc., had available a method for obtaining a final adjudication of his case -- by filing a written motion seeking final adjudication within thirty days of the deferred adjudication order -- he never availed himself of it. Instead, without seeking an adjudication of guilt, without receiving an adjudication of guilt, and without having traveled through the normal Texas criminal appellate process which was available to him had he only sought it, the Petitioner now comes to this Court for a review of his constitutional claim. The jurisdictional doctrine of finality embodied in 28 U.S.C. §1257 prohibits such review.

Petitioner admits that he could not appeal the deferred adjudication order to the Texas Court of Criminal Appeals. Before such an appeal may be taken, a judgment meeting the requirements of art. 42.01, Tex.C.Crim.Proc., is necessary, *Tyra v. State*, 548 S.W.2d 912 (Tex.Crim.App. 1977), and one of the requirements of art. 42.01 is that the defendant have either been adjudged guilty or discharged. *See* art. 42.01, §1(10); *Savant v. State*, 535 S.W.2d 190 (Tex.Crim.App. 1976). Such has not occurred in this case and, therefore, under Texas law there is no final judgment.

Likewise, there is no final judgment or decree for purposes of this Court's jurisdiction. Sentence and judgment have never been imposed upon Petitioner and, without these, the finality requirement has not been met. *Parr v. United States*, 351 U.S. 513, 518 (1956); *Berman v. United States*, 302 U.S. 211 (1937). Until and unless sentence and judgment are imposed upon Petitioner, he will suffer none of the disabilities that convicted felons suffer, *see* art. 42.12, §3d(c); yet, a convicted felon's being subjected to such disability is a prime ingredient imparting finality into a criminal proceeding. *Berman v. United States, supra*, 302 U.S. at 13.

In essence, Petitioner is seeking to avoid the finality requirement and have this Court review, without the benefit of a fully developed trial record, the denial of his motion to suppress. The Court has previously refused to assert jurisdiction and sanction this piecemeal approach to appellate criminal procedure, *Chapman v. California*, 405 U.S. 1020 (1972), and it should do so again.

II.

The Hashish Discovered By The Police Officers During The Inventory Search Of Petitioner's Automobile Was Not Seized In Violation Of The Fourth And Fourteenth Amendments To The United States Constitution

Petitioner challenges the constitutional validity of the police officers' seizure of the hashish during an inventory search of his car and argues that seizure was not in compliance with the guidelines of *South Dakota v. Opperman*, 428 U.S. 364 (1976),[2] for four basic reasons: (a) because there was no evidence of a Dallas police department policy for inventory searches of impounded vehicles; (b) because even if there was such a policy, it permitted the police officers too much discretion; (c) because the search exceeded the permissible bounds of an inventory search; and (d) because the search of the aluminum foil package was pretextual. The Fourth Amendment as explicated in *Opperman* was violated in none of these respects.

Petitioner's argument that there is no evidence of a policy for inventory searches borders on the frivolous. The only witness at the suppression hearing was a Dallas police officer who testified that disabled cars at

---

[2]At several points in the petition, Petitioner refers to Chief Justice Burger's *Opperman* opinion as a plurality opinion. It is not. It is an opinion for the Court, joined by four other Justices.

the scene of an accident are as a matter of course impounded to further the state law requirements of keeping the public streets clear. (SF 12, 28-29).[3] Throughout his testimony, both during direct and cross examination, the officer testified that the police department's policy was to conduct an inventory search of vehicles so impounded. (SF 14, 29-31, 33-34). Despite this extensive and unrefuted testimonial evidence, Petitioner argues that the existence of an inventory search policy has not been established because no *written* policy was introduced into evidence. Nothing in *Opperman* remotely suggests that only written policies suffice to insulate inventory searches from invalidity under the Fourth Amendment or that the Fourth Amendment imposes upon the state the hypertechnical evidentiary necessity of introducing into evidence at suppression hearings such written policies. The officer's unrefuted testimony suffices to establish the policy.

Next, Petitioner argues that, even if there was a policy, too much discretion was given the officers in the field in determining the scope of the inventory search. Again, nothing in *Opperman* imposes upon police departments the duty of establishing policies that rigidly require that only certain items in a vehicle be inventoried. While *Opperman* might be read to require that only a limited discretion may be exercised in determining *which* impounded cars to inventory, *see, e.g., United States v. Hellman*, 556 F.2d 442, 445 (9th Cir. 1977) (Sneed, J., concurring), this aspect of *Opperman* is not at issue here. There is no evidence that Dallas police officers have discretion in determining which impounded cars to inventory. The only testimony about discretion relates to a limited discretion placed in police officers as to the thoroughness of the inventory that they conduct. (SF 34-36). Limited discretion as to the extent

[3]"SF" refers to the transcript, or Statement of Facts, of the suppression hearing.

of an inventory search, as opposed to discretion over whether to conduct one at all, is a necessity since policies, by definition, are simply general guidelines. The items to be inventoried necessarily vary from case to case and cannot and should not be specified in advance by policy guidelines. Otherwise, one of the basic purposes of inventory searches -- protection of the officers from charges of theft, *see Opperman*, 428 U.S. at 369 -- would be undercut, since a detailed policy might very well omit one or several of the infinite variety in the types of personalty that might be found in cars.

The inventory search in this case clearly did not exceed the permissible bounds of an inventory search. The brown paper bag in which the hashish was found was in plain view near the driver's seat of Petitioner's car. To ensure that all readily removable items of personalty were inventoried so that any valuables of Petitioner's could be noted, *see Opperman, id.*, and so that the officers could be protected against the subsequent charges of pilferage, *id.*, it was necessary to itemize the contents of the bag, including what was contained in the aluminum foil package. Any less detailed itemization would make the inventory search a meaningless gesture. Additionally, such an inventory search of an item in plain view is certainly less intrusive than those that this Court has approved in *Opperman* (glove compartment), *Cady v. Dombrowski*, 413 U.S. 433 (1973) (car trunk), and *Cooper v. California*, 386 U.S. 58 (1967) (glove compartment).

Because an itemized listing of the contents of the brown paper bag, including whatever might have been wrapped in the aluminum foil package, was necessary to serve the purposes of an inventory search as approved in *Opperman*, Petitioner's argument that the search was pretextual and therefore invalid carries no weight. That during the inventory search the officer serendipitously discovered an item he thought might be contraband

means nothing. The search clearly was initiated as an inventory search and concluded as one, despite the fact that contraband happened to be one of the items inventoried. *Opperman* does not require the irrational result that an officer inventory only non-contraband items, leaving unlisted any items he thinks might be contraband.

The inventory search in this case was in full compliance with *Opperman*, and Petitioner's attempt to have the Court impose hypertechnical refinements of the *Opperman* guidelines having no relationship to the policies underlying those guidelines does not merit consideration.

III.

Since The Petition Was Not Filed Within The Time Limits Established By Rule 22(1), Rules Of The United States Supreme Court, This Court Should Refuse To Exercise Its Discretionary Powers of Review

This petition was not filed in a timely manner and, therefore, should not be considered by the Court.

Under Rule 22(1) of the rules of the Court, Petitioner had ninety days after the entry of the October 13, 1978, order to file his petition for a writ of certiorari with the Clerk of the Court.[4] For good cause shown, a Justice of the Court could extend this time limit for a period not exceeding sixty days. Therefore, absent an extension, Petitioner had until January 11, 1979, in which to file his petition and, with an extension, until March 12, 1979.

Petitioner did not even file a motion for extension of time until January 15, 1979, and in that motion, which has not been ruled upon, he sought an extension until

[4]This order is not a final judgment. *See* Part I, *supra*.

March 8, 1979. His petition was not ultimately filed until April 27, 1979 -- forty-six days after the latest date he could have filed under Rule 22(1) and fifty days after the date he had sought for his deadline. The Court should not condone such tardiness through exercising its discretionary powers under 28 U.S.C. §1257(3) to review this case.

CONCLUSION

Wherefore, for the reasons above stated, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

RENEA HICKS
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent